

his conduct subsequent to the date embodied in the charge but not in existence prior to it?

I have no hesitation in setting the sentence aside. Unfortunately I have no power to remit the case to the Magistrate to impose a suitable lawful sentence. There will accordingly be an order to the Accused to appear before this Court to shew cause why a lawful sentence should not be imposed upon him.

Order accordingly.

HEE CHENG v. KRISHNAN

[O. C. J. (Thomson J.) March 31, 1955]

[Ipoh — Civil Suit No. 225 of 1954]

Contract — Specific performance — State land held under Temporary Occupation Licence — Land Code (Cap. 138) — Land Rules, 1930, rr. 40 and 41 — Illegality under s. 24 Contracts (Malay States) Ordinance, 1950.

The plaintiff in this case claimed for specific performance or alternatively for damages for a breach of contract entered into between him and the defendant for the purchase of a house built upon a piece of land in respect of which a Temporary Occupation Licence was issued.

Held: the alleged contract was in fact an attempt to sell and to purchase defendant's rights under the Temporary Occupation Licence and therefore unlawful by reason of s. 24 of the Contracts (Malay States) Ordinance, 1950.

Case referred to:—

(1) *Phillips v. Copping* (1935) 1 K.B. 15, 21.

CLAIM for Specific Performance.

S. M. Sharma for the plaintiff.

B. K. Das for the defendant.

Thomson J. (delivering oral judgment) : — This is a claim for specific performance, or alternatively for damages for breach, of a contract which it is said was entered into between the plaintiff and the defendant in August, 1953, relating to Temporary Occupation Licence No. 43304 of which the defendant at all material times was and still is the holder, and a house built upon the piece of land in respect of which that licence was issued.

In my opinion the plaintiff's claim must fail.

In the first place, I am satisfied that on a true construction of the Plaint and on the view I take of the evidence as to what was, if the plaintiff's story be true, the intent of the parties, the alleged contract was in truth and in fact an attempt to sell and to purchase the defendant's rights under the Temporary Occupation Licence. As such, it was in my opinion, unlawful by

reason of Section 24 of the Contracts Ordinance as being of such a nature that if permitted it would defeat the provisions of any law and that it is therefore by reason of that Section void.

The land in question is State land. Dealings in State land, other than mining land and land in Malay Reservation, are subject to the provisions of the Land Code and any subsidiary legislation enacted under it. The licence with which I am here concerned was issued under Regulation 40 of the Land Rules 1930 and by Rule 41 of these Rules it is stated in terms "No licence for the temporary occupation of State land shall be transferable". That is the provision of the law which would be defeated if effect were given to a contract of this nature.

In that connection I quote the following passage from *Pollock and Mulla's* book on the Indian Contract Act, 7th Edition, page 145:—

"Where a specific kind of land or specific rights in land have been declared by the Legislature to be not transferable, a transfer of such land or rights in land is void, as to permit it would be to defeat the provisions of the law within the meaning of the section."

'The Section', of course being section 23 of the Indian Contract Act.

I am not overlooking the point that this question of the contract being unlawful has not been specifically pleaded. There are obvious reasons why it was not pleaded. The defendant has subsequently entered into a similar sort of transaction and no doubt it did not lie in his mouth to plead its illegality. Nevertheless, to my mind, it is well settled law that when a question of this sort arises clearly on the evidence "it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it." (See *Phillips v. Copping*⁽¹⁾).

I am aware that it may be an inconvenient point to take. I have been told from the Bar, and I fully accept it, that transactions of this sort have been going on for very many years. That, however, does not affect the point. It is equally true that betting transactions have been going on for many years, yet the Courts are not asked to take cognizance of them. And again, if such transactions have been going on for many many years and a body of supposed rights and interests have been thereby created it is for the State to remedy any injustice that may have arisen by way of legislation and not for the Courts to attempt to do so by flying in the face of the law.

Such is my opinion as to the question of law that arises in the case. I may be right and I may be wrong. As the matter is of some importance, I can only express a hope that it may be taken further.

Unfortunately, however, I have come to certain very definite conclusions regarding the facts of the case and I feel it to be my duty to state them now for if I do not state them it might be said that I had allowed the unsuccessful plaintiff to come to the Court of Appeal in ignorance that I had come to conclusions of fact.

Putting aside the question of illegality, the whole case turns on what took place at an interview which admittedly took place between the plaintiff and the defendant early in August, 1953, at which the proposed sale was discussed. The plaintiff's story was that there was then a concluded bargain by which the defendant was to sell and he was to purchase whatever was in question for the sum of \$2,000 in respect of which he paid \$200. The defendant's story, on the other hand, was that he was prepared to sell for \$2,500 but the plaintiff was not prepared to meet him as regards the price and the matter was therefore left in the air. He received no further communication from the plaintiff either by way of acceptance of his offer or by way of counter-offer, and, accordingly, some time later in April, 1954, he entered into a contract to sell the same subject as he had proposed to sell to the plaintiff to one Muck Yew Kam for a consideration of \$3,700 which in fact has not yet been paid.

On the evidence as a whole, I am satisfied, as a matter of fact, that the balance of reasonable probability is in favour of the defendant's version of the interview in August, 1953, and that the plaintiff has therefore failed to prove that any agreement, whether legal or otherwise, was concluded then or at any subsequent time.

I have so far found four reasons. I do not regard any one of these reasons as in itself necessarily conclusive but the cumulative effect of the four of them has been to produce in my mind the result which I have just stated.

In the first place, and here as always, I am very conscious of my own fallibility on such a point, the defendant struck me as the more truthful witness of the two.

In the second place, I was impressed by the fact that if an agreement was indeed concluded no memorandum of it was made in writing. The plaintiff had made a bargain which, presumably, he would not have made if it was not favourable to him; he had paid an appreciable sum in respect of the purchase price; he seems to be a businesslike man who keeps and preserves his papers and yet he did not take steps to make even a short memorandum of his bargain and have it signed.

In the third place, it is the plaintiff's story that the defendant wanted to sell the premises because he was in need of the money for a marriage which was to take place shortly (I think it was on the 23rd of that month). Now that is part and parcel of the plaintiff's story of the transaction. If the plaintiff's story be true, the defendant was not only a willing seller but was in need of the money. And yet there is not a scrap of evidence that the defendant took a single step to get the money by doing what he is said to have promised to do. It is all very well to say that he discovered later that he could make a better bargain and that he therefore repented of his former bargain. That may well be, but it is, to say the least of it, strange, if he was really in need of the money, that that second and better bargain should not have been struck until some 7 or 8 months later and that to this day he has not seen a half-penny of his money.

Finally, in my judgment, the plaintiff's conduct in going on paying rent after the conclusion of the alleged agreement is not consistent with his story that that agreement was concluded. What it comes to is this. He had paid something as substantial part of the price which was of the essence of the alleged agreement. The whole point of the arrangement was that in future he would be entitled to stay rent free in the premises for which he had hitherto been paying rent. And yet he shewed not a slightest anxiety to take advantage of his bargain. He went on paying rent for a period of months, the total amount in question being in the neighbourhood of \$300, and he was apparently content to go on doing so indefinitely without protest. Indeed, he took no steps to enforce compliance with the alleged bargain till he learned that the premises had, as he thought, been sold to somebody else.

Before departing from the case I would add, that in case I be held to be wrong both on the question of law and on the question of fact involved, that had I been compelled to find for the plaintiff rather than for the defendant, I should have assessed the damages at \$200 on the basis that the contract must be regarded, if at all, as one for the sale of the house. If the house was part of the land it was valueless. If it was unattached to the land then the measure of damages would be the difference between its market value at the time of the agreement. There is no evidence of any change in market values either of building materials or of houses not attached to the soil in 1953 or 1954 so there can be no question of damages. There only remains the question of the deposit of \$200. If it was in fact

paid, which I hold it was not, the plaintiff can at the best only be entitled to its return.

Judgment will be entered for the defendant with costs.

Claim dismissed.

Solicitors: S. M. Sharma; Das & Co.

**M. K. RAMASAMY PILLAI v. O. RM. M. SP. SU.
MEYAPPA CHETTIAR & ANOR.**

[A. C. J. (Thomson J.) March 9, 1955]

[Ipoh—Civil Appeal No. 12 of 1954]

Landlord and Tenant—Control of Rent Ordinance, 1948, s. 15—Bankruptcy of tenant—Whether Official Assignee became statutory tenant after termination of notice to quit—Meaning of statutory tenant.

The relevant facts in this case were shortly as follows:— The appellant was the tenant of premises which were subject to the provisions of the Control of Rent Ordinance, 1948. He was adjudicated bankrupt on October 26, 1953 and thereafter his rights under the contract of tenancy passed by virtue of the bankruptcy law to the Official Assignee. The appellant continued in occupation of the premises with the Official Assignee's permission. On December 30, 1953 the landlord's solicitors gave the Official Assignee a month's notice to quit the premises. The Official Assignee did not reply to the notice and the appellant remained in occupation of the premises. On March 11, 1954 the landlord commenced proceedings in the Sessions Court against the Official Assignee as the 1st defendant and the appellant as 2nd defendant in which he claimed vacant possession of the premises and mesne profits. At the hearing the Official Assignee appeared and informed the Court that he neither opposed nor admitted the claim and the trial proceeded on this basis. Judgment was given against the appellant for possession of the premises. The appellant appealed.

Held: (1) the Official Assignee could only have become a statutory tenant if he had remained in possession of the premises after the determination of his tenancy; (2) on the facts in this case the Official Assignee did not remain in possession of the premises after the determination of his tenancy and accordingly he was at no time a statutory tenant within the meaning of s. 15 of the Control of Rent Ordinance, 1948; (3) as the Official Assignee did not become a statutory tenant, the appellant was in the position of a trespasser and therefore the landlord was entitled to possession against him.

Cases referred to:—

- (1) *Thyne v. Salmon* (1948) 1 K.B. 482.
- (2) *Reeves v. Davies* (1921) 2 K.B. 486, 490.
- (3) *Stafford v. Levy* (1946) 2 All E.R. 256.
- (4) *Mercantile Bank of India (Trustees) Ltd. v. Ruth Nicholas* (1949) M.L.J. 104.
- (5) *Brown v. Draper* (1944) 1 K.B. 309, 315.
- (6) *Haskins v. Lewis* (1931) 2 K.B. 1.
- (7) *Skinner v. Geary* (1931) 2 K.B. 546.
- (8) *Dando Ltd. v. Hitchcock & Anor.* (1954) 2 Q.B. 317.
- (9) *Hiller v. United Dairies (London) Ltd.* (1934) 1 K.B. 57.

CIVIL APPEAL.

S. P. Seenivasagam for the appellant.

W J. Huntsman for the 1st respondent.

Cur. Adv. Vult.

Thomson J. :— This is an appeal from a judgment of the President of the Sessions Court at Kuala Kangsar relating to the possession of premises at No. 49, Jalan Datoh, Kuala Kangsar, of which the respondent to the present appeal is the proprietor and landlord.

The premises are apt to be subject to the provisions of the Control of Rent Ordinance, 1948, and at some time prior to November, 1952, the present appellant became a monthly tenant of them at a rent of \$80 per month payable in advance.

On 18th November, 1952, the landlord gave the appellant notice terminating his tenancy at 31st December next. There was considerable controversy at the trial as to what happened about this notice. The landlord said it had been withdrawn prior to its expiration. The appellant said it had never been withdrawn and that accordingly on its expiration on 31st December, 1952, he became a statutory tenant of the premises. In the event, however, the learned President found as a matter of fact that it had been withdrawn and that thereafter the appellant continued in occupation and continued to pay rent which the landlord accepted, and counsel for the appellant has conceded that against this finding of fact he is unable successfully to appeal.

On 26th October, 1953, the appellant was adjudicated bankrupt, the act of bankruptcy founded on having taken place on 21st January, 1953. On that event, though by virtue of the bankruptcy law his rights under his contract of tenancy passed to the Official Assignee, he remained in occupation of the premises with the Official Assignee's permission. On 18th December, 1953, solicitors for the landlord addressed a letter to the Official Assignee asking him to disclaim his interest in the premises. On 28th December, 1953, the Official Assignee replied to that letter stating that he did not "intend to disclaim the tenancy" and on 30th December, 1953, the landlord's solicitors gave him a month's notice to quit the premises. Apparently the Official Assignee did not reply to this notice and the appellant remained in occupation of the premises. Accordingly, on 11th March, 1954, the landlord commenced proceedings in the Sessions Court against the Official Assignee as first defendant and the appellant as second defendant in which he claimed vacant possession of the premises and mesne profits.

When the matter came on for hearing on 29th April, 1954, the Official Assignee appeared and